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No. 75-348

In the Supreme Court of the United States

OCTOBER TERM, 1975

B. V. CLEMONS, L.P.T., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, appellees move to affirm the judgment of the district court.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-14a) is not reported.

JURISDICTION

The judgment of the district court (J.S. App. 16a) was entered on March 26, 1975. A notice of appeal

(J.S. App. 17a) was filed on May 23, 1975. On July 21, 1975, Mr. Justice White extended the time for docketing the appeal to and including September 6, 1975. The appeal was docketed on September 4, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the Medicare Act impermissibly discriminates against independent physical therapists by limiting the reimbursement of providers for the cost of physical therapy services to an amount equal to the salary that the provider would reasonably have paid to an employee who had performed such services.

STATUTE INVOLVED

Section 1861(v)(5) of the Social Security Act, as added, 86 Stat. 1445-1446, 42 U.S.C. (Supp. III) 1395x(v)(5), provides:

> (A) Where physical therapy services, occupational therapy services, speech therapy services, or other therapy services or services of other health-related personnel (other than physicians) are furnished under an arrangement with a provider of services or other organization, specified in the first sentence of subsection (p) of this section the amount included in any payment to such provider or other organization under this subchapter as the reasonable cost of such services (as furnished under such arrangements) shall not exceed an amount equal to the salary which would reasonably have been paid

> for such services (together with any additional costs that would have been incurred by the provider or other organization) to the person performing them if they had been performed in an employment relationship with such provider or other organization (rather than under such arrangement) plus the cost of such other expenses (including a reasonable allowance for traveltime and other reasonable types of expense related to any differences in acceptable methods of organization for the provision of such therapy) incurred by such person, as the Secretary may in regulations determine to be appropriate.
>
> (B) Notwithstanding the provisions of subparagraph (A), if a provider of services or other organization specified in the first sentence of subsection (p) of this section requires the services of a therapist on a limited part-time basis, or only to perform intermittent services, the Secretary may make payment on the basis of a reasonable rate per unit of service, even though such rate is greater per unit of time than salary related amounts, where he finds that such greater payment is, in the aggregate, less than the amount that would have been paid if such organization had employed a therapist on a full- or part-time salary basis.

STATEMENT

This action was brought in the United States District Court for the Southern District of Ohio by 12 licensed physical therapists. The complaint challenged the constitutionality of Section 1861(v)(5)(A) of the Social Security Act, 42 U.S.C. (Supp. III) 1395x

(v)(5)(A), on the ground that it impermissibly discriminates against independent professional physical therapists by limiting reimbursement of providers for the cost of physical therapy services under the Medicare program to an amount equal to the salary that the provider would reasonably have paid to an employee who had performed such services. The complaint sought declaratory and injunctive relief.

A three-judge court was convened pursuant to 28 U.S.C. 2282. The court, with one judge dissenting, granted appellees' motions for summary judgment and dismissal of the complaint (J.S. App. 1a-14a).

1. Title XVIII of the Social Security Act, commonly known as the Medicare Act, is divided into two parts. Part A, 42 U.S.C. 1395c to 1395i-2, the part principally involved in this litigation, is designed to provide "basic protection against the costs of hospital and related posthospital services" for eligible individuals (42 U.S.C. (Supp. III) 1395c) by providing for government payment (primarily from trust funds derived from employment taxes) of the reasonable cost or customary charge (less specified deductibles) for certain defined basic medical services provided by hospitals, skilled nursing facilities, and home health agencies, which are termed "providers of services" (42 U.S.C. (Supp. III) 1395x(u)).[1] Providers of services are entitled to reim-

[1] Part B of the Medicare Act, 42 U.S.C. 1395j to 1395w, is a voluntary health insurance program financed in part by the government and in part by premiums paid by eligible individuals who elect to enroll in the program. It provides supplementary medical insurance benefits for physician and physician-related services.

bursement under the Medicare program for the reasonable cost of physical therapy services provided to beneficiaries. See 42 U.S.C. 1395d(a), 1395x(m)(2); 42 U.S.C. (Supp. III) 1395x(b)(3), (h)(3), (i), (n). Such services may be furnished either by the provider of services or by others pursuant to arrangements made with the provider.

The Act provides generally that "[t]he reasonable cost of any services [for purposes of reimbursement under the program] shall be the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services" (42 U.S.C. (Supp. III) 1395x(v)(1)(A)). The Act specifies that, where physical therapy and other therapy services are furnished by an independent therapist under an arrangement with a provider, the reasonable cost "shall not exceed an amount equal to the salary which would reasonably have been paid for such services * * * to the person performing them if they had been performed in an employment relationship with such provider * * * plus the cost of such other expenses (including a reasonable allowance for traveltime * * *) incurred by such person, as the Secretary may in regulations determine to be appropriate" (42 U.S.C. (Supp. III) 1395x(v)(5)(A)).[2]

[2] If a provider requires the services of a therapist on a limited part-time basis or only to perform intermittent services, however, the Secretary is authorized in certain circum-

2. The district court held that the "salary-equivalency" provision challenged by appellants "is not violative of the Fifth Amendment" (J.S. App. 11a), because it bears a rational relationship to "a legitimate governmental purpose" (*id.* at 9a). The court stated (*id.* at 10a):

> Congress intended to control Medicare costs by limiting fees for physical therapy services when it enacted § 1395x(v)(5)(A). * * * This governmental purpose of conserving limited resources to attain legislatively determined social and economic goals is constitutionally permissible. * * * The legislation is a good faith attempt to limit costs to reasonable fees for physical therapy services. This Court will not speculate about the possible success or failure of the statute in achieving its goal; although the Court notes that plaintiffs' argument that the legislation will not cut costs is attenuated.

The court disagreed with appellants' contention that physical therapists were singled out among other medical professionals for disfavored treatment, and it held that Congress could, in any event, properly focus its attention upon a particular problem in the program without simultaneously addressing every similar problem (*id.* at 10a-11a):

> Even assuming differential treatment, the legislature is not required to solve all problems at

stances to "make payment on the basis of a reasonable rate per unit of service, even though such rate is greater per unit of time than salary related amounts" (42 U.S.C. (Supp. III) 1395x(v)(5)(B)).

> once. It may legislate partial solutions, neglecting other equally important problems. * * * Congress was not constitutionally required to attempt to regulate all Medicare costs in the same manner.[3]

ARGUMENT

The decision of the district court is correct, and the question presented by the appeal does not merit plenary review.

1. Appellants contend (J.S. 8-10) that the statute must be subjected to strict scrutiny because it invades their "fundamental rights" "to associate together for business and * * * to contract or practice [their] profession" (*id.* at 9-10). No right to practice as a physical therapist is "explicitly or implicitly guaranteed by the Constitution" (*San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 33-34). Even if there were such a constitutionally protected right, it would not be invaded by the provision at issue here, which simply prescribes the method of calculating the reasonable cost of physical therapy services for purposes of Medicare reimbursement from public funds. The Act does not prohibit a provider from arranging to pay a physical therapist an amount greater than that for which the provider may receive reimbursement. Appellants remain free to practice or associate for business as they wish and

[3] Judge Duncan dissented on the ground that, in his view, there existed genuine issues of material fact concerning the constitutionality of the statute as applied to appellants (J.S. App. 12a-14a).

are at liberty to refrain from entering into an arrangement with a provider for the performance of physical therapy services for Medicare beneficiaries. See, *e.g.*, *Szekely* v. *Florida Medical Association*, 517 F. 2d 345 (C.A. 5); *Rasulis* v. *Weinberger*, 502 F. 2d 1006 (C.A. 7).[4]

2. The Fifth Amendment allows Congress broad "latitude in prescribing the conditions upon which funds shall be dispensed from the public treasury" (*Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, slip op. 22). Congress determined here that the reasonable costs of services performed by independent physical therapists should approximate the reasonable salary expense that would be incurred by a provider if the same services were performed by an employee. That determination reflects congressional concern "over the increasing costs of physical therapy services and other therapy services furnished in hospitals and extended care facilities," and the resulting statutory provision was aimed at "controlling program expenditures for therapy services and * * * preventing abuse" (H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 110 (1971)).

Reducing the costs of a social insurance program and preventing abuse of the program are legitimate

[4] Even if appellants are correct in asserting that Ohio law forbids providers from employing physical therapists (J.S. 2-4), that would not affect the validity of the Act's method of calculating reasonable costs. The statute prescribes the amount of reimbursement; it does not compel any provider to employ physical therapists.

governmental objectives (see *Weinberger* v. *Salfi*, *supra*, slip op. 24-25), and the means chosen by Congress to accomplish those objectives here are plainly reasonable.

3. Contrary to the dissenting opinion of Judge Duncan, appellants' assertions that the statute will not accomplish its economizing objectives and will "drive most if not all independents from the medicare services arena" (J.S. App. 14a) do not raise triable issues of fact that preclude the granting of summary judgment. Nothing in this Court's decisions suggests that an act of Congress may be sustained only if the government can prove in a district court that the factual underpinnings of the statute are correct. As the district court suggested, it would be inappropriate for a court to "speculate about the possible success or failure of the statute in achieving its goal" (J.S. App. 10a).

The inquiry, rather, is whether "any state of facts reasonably may be conceived to justify" the legislative classification (*McGowan* v. *Maryland*, 366 U.S. 420, 426). Appellants' doubts concerning the probable effects of the provisions limiting reimbursement for physical therapy services should be addressed to Congress, not the courts, and those doubts certainly do not call into question the constitutional validity of the Act.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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